Justice Department Ethics: Legislative Activity in the 106th Congress

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Summary

Three bills have been introduced in the Senate that focus on issues of federal prosecutorial ethics addressed in the Citizens Protection Act (McDade-Murtha) enacted as part of the omnibus appropriations package on October 21, 1998 (§801 of P.L. 105-277) and effective six months thereafter. The McDade-Murtha provision requires Justice Department litigators to abide by the ethical standards of the states and local federal courts where they conduct their activities. One of the bills, S. 755 (introduced by Senator Hatch), would have simply delayed the effective date of the McDade-Murtha provision an additional six months. The other two bills, S. 250 (also offered by Senator Hatch) and S. 855 (introduced by Senator Leahy), repeal McDade-Murtha. S. 855 replaces it with a call for a "no contact" standard applicable to Justice Department litigators and promulgated as an amendment to the federal rules of civil and criminal procedure. S. 250 permits the Attorney General to release Department litigators from otherwise applicable ethical standards that interfere with the effectuation of federal law or policy.

In related developments, on March 24, 1999, Senate Thurmond presided over a hearing of the Senate Judiciary Subcommittee on Criminal Justice Oversight dealing with the effect of state ethics rules on federal law enforcement. The Justice Department issued interim regulations implementing McDade-Murtha on April 20, 1999, 64 *Fed.Reg.* 19273.

This is a sketch of S. 250 and of S. 855 as well as the issues they address. A more extensive examination of those issues and citations for the authorities discussed here appear in *Justice Department Ethics and Section 801 of the Omnibus Appropriations Law for Fiscal Year 1999*, CRS Report RL30060, (abridged as *Justice Department Ethics and the McDade-Murtha Citizens Protection Act*, CRS Report RS20064).

Background

Early in the twentieth century, the American Bar Association (ABA) announced a series of general ethics rules for attorneys. Although subsequently revised—first as the Model Code of Professional Responsibility and then as the Model Rules of Professional Conduct—these canons have remained little changed in substance over the years. Each of the states has adopted standards drawn either from the ABA's Model Code or its Model Rules. Most of the United States District Courts have required lawyers practicing before them to follow the rules of the states in which the court is located. By operation of a provision in their annual appropriations provisions, Justice Department lawyers have been required to obey the rules of states in which they are admitted to practice since the 1930s.[1]

The so-called no contact rule, a feature of both the rules of virtually every state and most United States District Courts, is the source of the most common objection to McDade-Murtha. The no contact rule bars one attorney from dealing directly with the client of another without permission.[2] It is designed to prevent attorneys from taking unfair advantage of unschooled opposing litigants. The basic rule is essentially the same in virtually every American jurisdiction. It applies only to contacts with those represented by another lawyer. It holds lawyers responsible not only for their own contacts with opposing parties, but for the contacts by their "alter egos" (i.e., those working under their direction such as FBI agents, undercover agents, or sometimes informants). It applies whether the client is human or corporate. It applies even if the client makes the initial contact and does not want his attorney informed. It is applicable in both civil and criminal cases. In most jurisdictions, it applies in criminal cases only after the client has been arrested for, or charged with, a criminal offense. The rule in a few states, however, has been construed to apply prior to arrest and indictment.

The breath of the rule's application and its perceived impact on federal law enforcement civil and criminal investigations induced the Department of Justice promulgate an exemption for Department attorneys first in a general memorandum and then by regulation, based on to the Attorney General's law enforcement powers.[3] S.250 grants the Attorney General the authority courts have thus far held she lacks to grant an exemption. S. 855 calls for the Judicial Conference to craft a no contact rule.

Grand jury-related ethics rules are neither as uniform nor as judicially well received as the no contact rules. A few states have rules imposing conditions on the circumstances under which attorneys may be subpoenaed to testify about their clients; a few more have rules requiring prosecutors to bring exculpatory evidence to the attention of the grand jury. Concerns here seem less pressing because some of the courts have been more receptive to the Department's arguments that rules exceed the authority of the federal district courts and the state, and because internal Department guidelines seem to have reduced the risk of overreaching in the area.

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[1] E.g., 52 Stat. 269 (1938); P.L. 96-132, 93 Stat. 1040 (1979); P.L.105-277, §102, 112 Stat. 2681-66 (1998).

[2] Rule 4.2 of the ABA Rules of Professional Conduct ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so"); ABA Code of Professional Responsibility, DR 7-104(A).

[3] The courts have yet to accept the Attorney General's claim to such authority, *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1254-257 (8th Cir. 1998); *In re Howes*, 123 N.M. 311, 318-23, 940 P.2d 159, 166-96 (1997); *United States v. Ferrara*, 847 F.Supp. 847 F.Supp. 964, 968-70 (D.D.C. 1993), *aff'd on other grounds*, 54 F.3d 825 (D.C.Cir. 1995); *United States v. Lopez*, 4 F.3d 1455, 1458 (9th Cir. 1993); *In re Doe*, 801 F.Supp. 478, 484-87 (D.N.M. 1992).

Features of S. 250

The Commission

The bill envisions a study commission of seven judges appointed by the Chief Justice (the Commission on Federal Prosecutorial Conduct), §2(d). The Commission is charged with the responsibility to study and report to the Attorney General as to "(I) whether there are specific Federal duties related to investigation and prosecution of violations of Federal law which are incompatible with the relation of the conduct of Federal prosecutors . . . by any State law or rule governing ethical conduct of attorneys; and (II) the procedures utilized by the Department of Justice to investigate and punish inappropriate conduct by Federal prosecutors," §2(d). The Attorney General is to provide the Commission with a confidential summary report of the recent activities of the Department of Justice's Office of Professional Responsibility[4] and the Commission has the authority to request information from other federal agencies, §2(d).

Prohibited Conduct

The bill instructs the Attorney General to establish a range of penalties to be imposed should any Department of Justice employee or officer,[5] "in the discharge of his or her official duties, intentionally:

(A) seek the indictment of any person in the absence of a reasonable belief of probable cause, as prohibited by the Principles of Federal Prosecution, *United States Attorneys' Manual* 9-27.200 et seq.;

(B) fail to disclose exculpatory evidence to the defense in violation of his or her obligations under *Brady v. Maryland* (373 U.S. 83 (1963));

(C) mislead a court as to the guilt of any person by knowingly making a false statement of material fact or law;

(D) offer evidence known to be false;

(E) alter evidence in violation of section 1512 of title 18, United States Code;

(F) attempt to corruptly influence or color a witness's testimony with the intent to encourage untruthful testimony, in violation of section 1503 or 1512 of title 18, United States Code;[6]

(G) violate a defendant's right to discovery under Rule 16(a) of the Federal Rules of Criminal Procedure;[7]

[4] A similar confidential annual report of the activities of the Office of Professional Responsibility is to be presented to Judiciary and Appropriations Committees, §2(c). For several years, the Office included this information in a publicly available annual report, *Office of Professional Responsibility: Fiscal Year 1996 Annual Report* (1997).

[5] Presumably including officers and employees of the Federal Bureau of the Investigation, the Drug Enforcement Administration, and the Immigration and Naturalization Service.

[6] 18 U.S.C. 1503 and 1512 outlaw obstruction of justice in federal judicial proceedings. There is no mention of 18 U.S.C. 1505 that proscribes obstruction of administrative and congressional inquiries.

[7] Rule 16(a) entitles the defense to discovery of statements of the defendant; evidence of the defendant's past criminal record; as well as tangible evidence, reports of tests and examinations, and summaries of expert witness testimony that the government intends to use in its case in chief.

(H) offer or provide sexual activities to any government witness or potential witness in exchange for or on account of his or her testimony; or

(I) improperly disseminate confidential, non-public information to any person during an investigation or trial, in violation of—

(i) section 50.2 of title 28, Code of Federal Regulations;[8]

(ii) Rule 6(e) the Federal Rules of Criminal Procedure;[9]

(iii) subsection (b) or (c) of section 2232 of title 18, United States Code;[10]

(iv) section 6103 of the Internal Revenue Code of 1986; or

(v) United States Attorneys' Manual 1-7.000 et seq.,"[11] §2(b).

Ethics Standards for Federal Prosecutors

The bill repeals McDade-Murtha provisions, 28 U.S.C. 530B, that call for Justice Department litigators to follow the ethical rules of the legal profession in place where they conduct their activities, so that complaints of abuse of authority by federal litigators can be addressed where they arise.[12] With a critical exception, S. 250 codifies the rule, heretofore carried forward in annual appropriations measures,[13] that requires Justice Department attorneys to abide by the ethical standards applicable in the states in which they are licensed to practice, proposed 28 U.S.C. 530B(a). The exception empowers the Attorney General to excuse compliance with this requirement in the interests of federal law enforcement, proposed 28 U.S.C. 530B(b).

Features of S. 855

No Contact Rule

S. 855 instructs the Judicial Conference to report no contact rule amendments for the federal rules of civil and criminal procedure to the Supreme Court within a year, proposed 28 U.S.C. 530B(c).

[8] 28 C.F.R. §50.2 sets the guidelines for the release of information to the news media by Department of Justice personnel.

[9] Rule 6(e) prohibits the disclosure of matters occurring before the grand jury subject to exceptions set forth in the rule; violations of Rule 6(e) constitute contempt of court.

[10] 18 U.S.C. 2232 outlaws tipping off the subjects of a court ordered wiretap.

[11] Sections 1-7.000 to 1-7.700 of the *United States Attorneys' Manual* further addresses disclosures to the media by Justice Department personnel.

This list of nine proscriptions might be considered a more tightly drawn version of the ten prohibitions found in the Citizens Protection Act as passed by the House in the FY'99 omnibus appropriations measure, and stricken in conference. The tenth, omitted from S. 250, was a residual clause covering other forms of misconduct, §821, H.R. 4276, *reprinted at*, 144 *Cong.Rec.* H7227 (daily ed. Aug. 5, 1998).

[12] Earlier versions of McDade-Murtha would have also created an independent misconduct review board that would have enjoyed final authority to fine, fire or otherwise punish wayward Justice Department employees for abuse of authority.

[13] E.g., 52 Stat. 269 (1938); P.L. 96-132, 93 Stat. 1040 (1979); P.L. 105-277, §102, 112 Stat.2681-66 (1998).

Other Standards

The bill provides a three part standard for other matters. Justice Department litigators must comply with the rules and decisions of any tribunal before which they appear, proposed, 28 U.S.C. 530B(b)(1). In grand jury matters, they must following the rules and decisions of the court under whose authority the grand jury is convened, 28 U.S.C. 530B(b)(2). Otherwise, they are bound by the rules of the state in which they are licensed to practice, 28 U.S.C. 530B(b)(3).

Pros and Cons

McDade-Murtha stands for the proposition that the most realistic vehicle for punishing abuse of authority by federal prosecutors lies with the disciplinary authorities of the federal district courts and the state bars where the misconduct is alleged to have occurred. Implicit in this view is the belief that any damaging conflicts with federal law enforcement interests should be resolved legislatively.

S. 250 stands for the proposition that vesting disciplinary authority over federal prosecutors anywhere but in the Department of Justice poses a potential threat to their effectiveness. The prospective impact of expansive interpretations of the no contact rule on attorney-directed undercover investigations and inquiries into improper corporate behavior are usually offered to explain the need for passage of S. 250.

S. 855 returns the law to its status prior to the enactment of McDade-Murtha, but directs the Judicial Conference to formulate a no contact rule.

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